IN THE SUPREME COURT OF
THE UNITED STATES

NO. 79-6330

WILLIAM ANTHONY BROOKS,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF
CERTIORARI TO THE SUPREME
COURT OF GEORGIA

BRIEF FOR THE RESPONDENT
IN OPPOSITION

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ARTHUR K. BOLTON
Attorney General

ROBERT S. STUBBS, II
Executive Assistant
Attorney General

DON A. LANGHAM
First Assistant
Attorney General

JOHN C. WALDEN
Senior Assistant
Attorney General

DARYL A. ROBINSON
Assistant
Attorney General

Please serve:

DARYL A. ROBINSON
132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3349

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QUESTION PRESENTED

I.

Is Georgia's death penalty law, previously upheld in Gregg v. Georgia, 428 U.S. 153 (1976), constitutional?

STATEMENT OF THE CASE

Petitioner, William Anthony Brooks, was convicted in the Superior Court of Muscogee County, Georgia, for the kidnapping, rape, armed robbery and murder of Carol Jeannine Galloway. The jury found two statutory aggravating circumstances: (1) the murder was committed while the offender was engaged in the commission of rape and armed robbery and (2) the murder was outrageously or wantonly vile, horrible or inhuman.

Brooks' convictions and sentences [1] were affirmed by the Supreme Court of Georgia in Brooks v. State, 244 Ga. 574, 261 S.E.2d 379 (1979). The evidence, set forth in detail in the appellate decision, showed that Brooks accosted Miss Galloway, age 23, at gunpoint in the front yard of her parents' residence and, at gunpoint, ordered her to get into her car and drive away.

> . . .[Brooks] ordered Miss Galloway to park the car and walk into the nearby woods where he first robbed Miss Galloway of at least $20.00 and then raped her. Following appellant's completion of the sex act, Miss Galloway reiterated her continuing plea that appellant permit her to leave. Appellant's sole response was to ask Miss Galloway if she had ever experienced sex before, and when told by Miss Galloway that she had not, to taunt her with his disbelief. At this point, Miss Galloway began to scream.

---

[1] Brooks was sentenced to death for murder, to life for kidnapping and rape, and to twenty years for armed robbery.

> When she did not heed his warning to stop, the appellant, to impress upon Miss Calloway the seriousness of his warning, aimed his gun at her face and pulled the handle back into a cocked position. When Miss Galloway continued to scream, the appellant fired one shot, his bullet piercing Miss Galloway's lower neck and causing a slow but steady loss of blood which resulted (but only after the passage of a full two hours) in her death.

Id. at 575. Brooks fled, and was not captured for almost one month. After arrest, he confessed to the crimes and his confessions were introduced into evidence. Id.

REASONS FOR NOT GRANTING THE WRIT

I. GEORGIA'S DEATH PENALTY LAW, UPHELD BY THIS COURT IN GREGG v. GEORGIA, 428 U.S. 153 (1976), IS CONSTITUTIONAL.

Petitioner enumerates three reasons for which the writ of certiorari should be granted. As Petitioner notes, none of the issues has been presented to the Supreme Court of Georgia. Of course, this Court does not decide issues raised for the first time in petitions for writs of certiorari. See, e.g., Tacon v. Arizona, 410 U.S. 351, 352 (1973); Cardinale v. Louisiana, 394 U.S. 437 (1969). However, because the issues presented are purely legal questions involving settled principles of law, Respondent will address those issues briefly and this Court may determine that the writ should not issue for the reasons presented.

A. Ga. Code Ann. § 27-2534.1(b)(7) is not unconstitutionally vague; furthermore, the jury found a second aggravating circumstance.

In his first attack on Georgia's death penalty statute, Petitioner asserts that Ga. Code Ann. § 27-2534.1(b)(7) is unconstitutionally vague. Contrary to Petitioner's assertion, the identical issue is not presently pending before this Court in Godfrey v. Georgia, No. 78-6899. Godfrey is a case in which Ga. Code Ann. § 27-2534.1(b)(7) is the only statutory aggravating circumstance found by the jury; the narrow issue presented in Godfrey is whether the seventh aggravating circumstance was unconstitutionally applied in that case.

In the present case, the jury found two aggravating circumstances. In addition to finding the murder vile, horrible and inhuman, the

jury found that the murder was committed while the offender was engaged in the commission of two other capital felonies, armed robbery and rape.

In Harris v. State, 237 Ga. 718, 732, 230 S.E.2d 1 (1976), sentence vacated on other grounds, Harris v. Hopper, 243 Ga. 244, 253 S.E.2d 707 (1979), the court recognized the possibility of abuse of the seventh statutory aggravating circumstance and stated "[u]nder our duty specified in Code Ann. § 27-2537(c)(2) we have no intention of permitting this statutory aggravating circumstance to become a 'catch all' for cases simply because no other statutory aggravating circumstance is raised by the evidence." Clearly, the Supreme Court of Georgia recognizes its duty under the law and has evidenced its intent to perform that duty properly.

However, the present case does not present the issue of the seventh aggravating circumstance being used as a "catch all" to impose a death penalty in the absence of any other aggravating circumstance. Brooks kidnapped his victim from her parents' home, raped her, robbed her, ignored her pleas to be released, and, as the young girl screamed, shot her, causing her to bleed to death two hours later. Thus, the jury was authorized to find and did find that Ga. Code Ann. § 27-2534.1(b)(2) was twice present in that Brooks murdered his victim during the commission of a rape and an armed robbery. Even if the seventh statutory aggravating circumstance were unconstitutional, and it is not, the evidence supported the jury's finding of another aggravating circumstance, therefore the sentence would not be impaired. See, e.g., Stephens v. State, 237 Ga. 259, 261-62, 227 S.E.2d 261 (1976).

B. As already determined by this Court, the Georgia death penalty statutory scheme does not grant unlimited, unguided discretion to the jury.

Petitioner next contends that the trial court failed to instruct the jury on guides, standards or reasons to be used in recommending not to impose the death penalty. The contention apparently is that the trial court should have given more specific instructions on when the jury could recommend mercy. The argument, carried to its logical conclusion, is that the jury can recommend mercy in only the most limited circumstances. A statutory scheme either written or applied in the manner suggested by Petitioner might well run afoul of those concerns voiced by this Court in Woodson v. North Carolina, 428 U.S. 280 (1976), Roberts v. Louisiana, 428 U.S. 325 (1976), and Lockett v. Ohio, 438 U.S. 586 (1978).

This Court was concerned in Furman v. Georgia, 408 U.S. 238 (1972) and Gregg v. Georgia, 428 U.S. 153 (1976) with the likelihood of inflicting the death penalty in an arbitrary nd capricious manner, not with the unrestricted license of a jury to extend mercy to a convicted defendant. Surely Petitioner does not argue that this Court in Gregg required a trial judge to set guidelines within which the jury could consider granting mercy to the defendant. The concerns of this Court, most recently in Lockett v. Ohio, supra, have been with impermissible limitations on the jury's consideration of mitigating evidence, not with the necessity of creating boundaries within which a jury must remain in order to recommend a sentence other than death. Gregg v. Georgia, supra, explicitly recognized the discretion of the jury in deciding not to impose the death penalty.

Nevertheless, a review of the trial court's sentencing instruction shows a thorough and accurate charge to the jury. The trial court instructed:

> . . .Your responsibility at this stage of the trial is to determine first whether any mitigating or aggravating circumstances existed at the time the murder was committed, which would authorize you to recommend the death penalty for the defendant.
>
> Before you would be authorized to recommend the death penalty, you must first determine whether, at the time the crime was committed, the following Statutory, aggravating circumstances existed beyond a reasonable doubt. . .

(T. 885). After instructing the jury on the pertinent statutory aggravating circumstances, the trial court continued:

> Now, ladies and gentlemen, if you find that either of these aggravating circumstances existed beyond a reasonable doubt, and if you recommend the death penalty, then the Court is required by law to sentence the defendant to death.
>
> On the other hand, you can see fit, ladies and gentlemen, whether aggravating circumstances existed or not, to recommend mercy for the defendant if this should be your finding, then in that event the Court is required by law to sentence the defendant to life imprisonment.

In arriving at your determination, you are authorized to consider all the evidence received throughout this trial, presented by both the State and the defendant. You are authorized to include in your consideration the facts and circumstances, if any, in mitigation and aggravation.

Mitigating circumstances are those which do not constitute a justification or excuse for the offense in question, but which in fairness and mercy may be considered as extenuating or reducing the degree of moral culpability or blame.

Aggravating circumstances are those, ladies and gentlemen, which increase the guilt or the enormity of the offense, or add to its injurious consequences.

* * *

Now, ladies and gentlemen, even though you find Statutory, aggravating circumstances exist, you may refuse to recommend the death penalty, in which event the defendant would receive a sentence of life imprisonment.

(T. 886-88). The jury was plainly instructed that it could recommend a sentence of death only if it found statutory aggravating circumstances. The jury was further instructed that even if it found such circumstances it need not impose a death penalty and could in its discretion recommend mercy. Finally, the jury was

told that unless aggravating circumstances existed, a life sentence only could be imposed.

One cannot imagine a more explicit and correct instruction to the jury on its role under the Georgia death penalty statute.

Defendants of an earlier day attacked rigid and mechanistic imposition of the death penalty. Petitioner's theory, if put into practice, would reimpose those rigid and mechanistic standards to considerations of mercy.

C. The trial court properly instructed the jury on mitigating evidence.

Petitioner's narrow approach extends as well to the area of mitigating evidence. He argues that the courts have a duty to develop a definition of mitigating evidence and to instruct the jury on that definition.

The trial court's instruction, having been excerpted in pertinent part in the previous portion of this brief, need not be recited a second time. It is apparent that the jury was instructed o. the definition of mitigating circumstances and that the definition given was liberal and open. The jury was also instructed that they could consider all evidence presented during the trial. Thus, as provided by the statute, the trial jury was free to consider any evidence whatsoever which had been presented at trial in determining whether mitigating evidence existed. Petitioner's argument that the jury should have been given additional guidance in considering mitigating evidence comes very close to the statutory provisions which this Court condemned in Lockett v. Ohio, supra.

The ability of the jury to consider a wide range of mitigating circumstances without limitation when assessing the appropriate penalty to impose was one factor considered by this Court in

upholding Georgia's death penalty in Gregg v. Georgia, supra.

> . . .The Georgia Legislature has plainly made an effort to guide the jury in the exercise of its discretion, while at the same time permitting the jury to dispense mercy on the basis of factors too intangible to write into a statute. . .

Gregg v. Georgia, 428 U.S. 153, 222 (1976)(White, J., concurring). It is evident the jury was given wide discretion in considering mitigating evidence. That discretion should not be curtailed.

CONCLUSION

No sufficient reasons having been presented, the petition for writ of certiorari should be denied.

Respectfully submitted,

ARTHUR K. BOLTON
Attorney General

ROBERT S. STUBBS, II
Executive Assistant
Attorney General

Don A. Langham
DON A. LANGHAM
First Assistant
Attorney General

John C. Walden
JOHN C. WALDEN
Senior Assistant
Attorney General

Daryl A. Robinson
DARYL A. ROBINSON
Assistant
Attorney General

Please serve:

DARYL A. ROBINSON
132 State Judicial Bldg.
40 Captiol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3349

CERTIFICATE OF SERVICE

I, Daryl A. Robinson, Attorney of Record for the Respondent, and a member of the Bar of the Supreme Court of the United States, certify that in accordance with the rules of the Supreme Court of the United States, I have this day served a true and correct copy of this Brief for Respondent in Opposition upon Petitioner's attorney by depositing a copy of this Brief in the United States mail, with proper address and adequate postage to:

Mr. John J. Callahan
Attorney for Petitioner
645 National Bank Building
Toledo, Ohio 43604

This 21st day of April, 1980.

Daryl A. Robinson
DARYL A. ROBINSON